No. 94-937

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MEREX A.G.,

Petitioner,

v.

FAIRCHILD WESTON SYSTEMS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment guaranteed Merex a jury trial on its promissory estoppel claim.

2. Whether the District Court acted within its discretion under Fed. R. Civ. P. 39 (c) when it declared the jury advisory as to Merex's promissory estoppel claim.

3. Whether the District Court acted properly in dismissing Merex's promissory estoppel claim after trial.

4. Whether the District Court acted properly in granting Fairchild's Fed. R. Civ. P. 50 (a) motion during trial to dismiss Merex's claims for breach of contract and *quantum meruit.*

5. Whether the District Court abused its discretion in declining to present Merex's proposed claim for tortious interference to the jury.

6. Whether the Second Circuit acted properly in rejecting Merex's request for a new trial based upon the District Court's alleged evidentiary and procedural errors during trial.

7. Whether the District Court acted within its discretion in denying Merex's motions for discovery sanctions and Fed. R. Civ. P. 56 (g) sanctions.

PARTIES

Respondent, Fairchild Weston Systems Inc., was a wholly owned subsidiary of Schlumberger Limited, Schlumberger Technology Corporation and Sangamo Weston, Inc. On June 27, 1989 -- during the pendency of this action -- the assets and liabilities of Fairchild Weston Systems Inc. were purchased by Loral Computer Systems Corporation, which subsequently changed its name to Loral Fairchild Corp. Loral Fairchild Corp. is a subsidiary of Loral Corporation. Respondent is referred to in this brief as Fairchild.

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RESPONDENT'S BRIEF IN OPPOSITION

Fairchild respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 29 F.3d 821 (2d Cir. 1994) and is reproduced in Merex's Appendices at 42a-53a.

STATEMENT OF THE CASE

In this action, Merex sought to recover a $1.6 million commission (representing 8% of the sales price) as compensation for its brokerage services in connection with Fairchild's September 1984 sale of camera equipment to the

People's Republic of China.[1] Merex's complaint asserted three alternative theories of recovery: breach of contract; *quantum meruit*; and promissory estoppel.

After Fairchild moved pursuant to Fed. R. Civ. P. 12 (b) (6) to dismiss the action on Statute of Frauds grounds, the District Court held the motion in abeyance and granted Merex leave to file an amended complaint annexing the writings that comprised the purported commission agreement. Following Merex's submission of its amended complaint, Fairchild renewed its motion to dismiss. In response, the District Court ruled that it would consider Fairchild's motion to be one for summary judgment, and directed the parties to conduct limited discovery, pursuant to Fed. R. Civ. P. 56 (f), on the issue of whether there was a commission agreement between Merex and Fairchild.

The District Court ultimately denied Fairchild's motion for summary judgment and directed the parties to conduct Fed. R. Civ. P. 26 discovery. During the course of such discovery, Merex moved for sanctions against Fairchild, claiming that Fairchild had failed to comply with an April 2, 1986 memo endorsed discovery order (Appendix D at 54a) issued by the District Court during the Rule 56 proceedings. Fairchild cross-moved for discovery sanctions.

Magistrate Judge Naomi Reice Buchwald denied the sanctions motions, but concluded that "counsel for plaintiffs [Merex] has taken the more extreme and unjustified approach" (Appendix E at 60a). The District Court then denied Merex's motion for reconsideration, repeatedly

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[1] Fairchild adopts and incorporates by reference the summary of facts contained in the Second Circuit's opinion (*see* Appendix C at 43a-45a).

criticizing and admonishing Merex's counsel for his conduct (Appendix I at 80a-109a).

Once discovery was completed, the parties began negotiating a pre-trial order. In the final pre-trial order submitted to the Court, Merex demanded a jury trial of all issues. Merex also requested to amend its complaint to assert a new claim for tortious interference, to which Fairchild objected.

The trial was conducted in April 1992. At the conclusion of Merex's direct case, Fairchild moved to dismiss pursuant to Fed. R. Civ. P. 50 (a). The District Court granted the motion as to Merex's breach of contract and *quantum meruit* claims, but denied the motion as to the promissory estoppel claim. However, the Court also ruled that the promissory estoppel claim was an equitable claim on which Merex was not entitled to a jury trial as a matter of right. The Court therefore declared the jury to be advisory as to the promissory estoppel claim.

At the conclusion of the trial, the advisory jury rendered a general verdict in favor of Merex. In a Memorandum Opinion and Order dated December 29, 1992 (Appendix A at 1a-36a), the District Court issued findings of fact and conclusions of law dismissing Merex's promissory estoppel claim. It also reaffirmed its dismissal of Merex's breach of contract and *quantum meruit* claims.

After the District Court's denial of Merex's post-trial motion for Fed. R. Civ. P. 50 (b), 52 (b) and 59 relief, Merex appealed to the Second Circuit, which affirmed the District Court's dismissal of Merex's claims (Appendix C at 42a-53a). The Second Circuit thereafter rejected Merex's post-appeal requests for relief, including Merex's petition for re-hearing *en banc* (Appendix F at 62a-63a). The instant petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Merex's petition for a writ of certiorari should be denied because the petition does not establish any "special and important reasons" for granting the writ, as required by Rule 10 of the Rules of this Court[2]. To the contrary, the record in this case establishes that the decision below turned on its own facts. Moreover, the Second Circuit's determinations regarding Merex's alleged entitlement to a jury trial on its promissory estoppel claim were correct and followed precedent (*see* 1 and 2 below); Merex's remaining contentions principally concern evidentiary questions, factual findings and other matters of District Court discretion that do not present reasons justifying this Court's exercise of discretion to review on writ of certiorari (*see* 3 below).

1. THE SECOND CIRCUIT PROPERLY HELD THAT THE SEVENTH AMENDMENT DID NOT GUARANTEE MEREX THE RIGHT TO A JURY TRIAL ON ITS PROMISSORY ESTOPPEL CLAIM

In determining that the Seventh Amendment's right to a jury trial did not extend to Merex's claim for promissory estoppel, the Second Circuit applied a two-fold, historical analysis recognized by this Court: whether the action would have been deemed equitable or legal in 18th century England and whether the remedy sought is inherently legal or equitable in nature (Appendix C at 46a, citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) and *Tull v. United States*, 481 U.S. 412, 417-418 (1987)). The Second Circuit then

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[2] The petition also should be denied pursuant to Rule 14.5 of the Rules of this Court because it is inadequate on its face in that it fails to clearly and accurately present the points that Merex believes to require consideration.

relied on well-settled authority to conclude that a promissory estoppel claim asserted to avoid the Statute of Frauds was equitable in nature (Appendix C at 46a-48a) and that Merex's prayer for money damages did not outweigh the equitable nature of the claim as a whole (Appendix C at 48a-50a).

Significantly, Merex's petition does not even attempt to challenge this analysis. Instead, Merex cites a Second Circuit decision (*Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787 (2d Cir. 1986)) and a Southern District of New York decision (*Marilyn Miglin, Inc. v. Gottex Industries, Inc.*, 790 F. Supp. 1245 (S.D.N.Y. 1992)) to support its contention that "promissory estoppel is a jury issue" (petition at 24-25). Merex's reliance on these decisions is wildly misplaced.

Specifically, these cases simply do not stand for the proposition that a plaintiff has a constitutional right to a jury trial on a promissory estoppel claim. Moreover, neither case is even remotely relevant to the issues presented for review here. *Esquire Radio* involved a situation in which issues of fact with respect to both claims at law (breach of contract) and claims at equity (promissory estoppel) were submitted to the jury. In *Marilyn Miglin*, the court denied a pre-trial motion for summary judgment dismissing a promissory estoppel claim because it found that issues of fact existed.

In short, the Second Circuit's determination here fully considered and correctly decided the issue of Merex's entitlement under the Seventh Amendment to a jury trial on its promissory estoppel claim, and Merex has not raised any issue on this point for review under Rule 10 of the Rules of this Court. Accordingly, Merex's petition should be denied.

2. THE SECOND CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT ACTED WITHIN ITS DISCRETION UNDER FED. R. CIV. P. 39 (C) WHEN IT DECLARED THE JURY ADVISORY AS TO MEREX'S PROMISSORY ESTOPPEL CLAIM

The Second Circuit relied upon the plain meaning of Fed. R. Civ. P. 39 (c) to conclude that the District Court had the discretion to try the equitable promissory estoppel claim before an advisory jury (Appendix C at 50a). In fact, the Court of Appeals observed that it would have been reversible error for the District Court **not** to have declared the jury advisory (*Id*, citing *Mallory v. Citizens Utilities Co.*, 342 F.2d 796, 797-798 (2d Cir. 1965)).

Merex's petition raises two arguments on this point, each of which is without merit.

First, Merex cites a number of decisions for the proposition that a trial court abuses its discretion when it declares the jury advisory after the start of trial (petition at 23-24). As the Second Circuit properly held, however (Appendix C at 51a-52a), the cases in question are all distinguishable and inapposite from the instant case.

Specifically, in some of the cases cited by Merex, the trial court's designation of the jury as advisory was overturned because the claims in issue were found to be claims at law on which the parties had the right to a jury trial. *See Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981) (personal injury claim); *AMF Tubuscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965) (damage claim for patent infringement); *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979) (damage claim for employment discrimination). These cases obviously have no

applicability to the instant case, where the promissory estoppel claim in question was an equitable claim on which Merex had no right to trial by jury.

In other cases cited by Merex, a trial court's designation of the jury as advisory was overturned because the designation was made so late in the proceedings that the parties were prejudiced by it. *See Bereda v. Pickering Creek Industrial Park, Inc.*, 865 F.2d 49 (3rd Cir. 1989) (designation not made until after jury returned verdict); *Thompson v. Parkes*, 963 F.2d 885, 888 (6th Cir. 1992) (designation not made until court rendered written opinion one week after jury verdict); *Hildebrand, supra* (court took case away from jury after both sides had rested). In sharp contrast, the District Court in the instant case informed both parties at the earliest possible time that the jury would sit in an advisory capacity -- as soon as Merex's claims at law were dismissed.[3]

In sum, Merex's cases on this point do not raise any issue for review under Rule 10.

Second, Merex contends that, because it demanded a jury trial in the pre-trial order and Fairchild accepted such demand, the District Court was divested by Fed. R. Civ. P. 16 (e) of any discretion to declare the jury advisory as to the promissory estoppel claim (petition at 22). Merex cites no authority whatsoever in support of this novel and strained

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[3] Finally, *DeGioia v. United States Lines Company*, 304 F.2d 421 (2d Cir. 1962) (petition at fn. 25), also fails to support Merex's argument here. Indeed, that decision is entirely irrelevant to the issue Merex raises in its petition. The court in *DeGioia* merely held that a co-third party defendant to an indemnification claim was not prejudiced by having the claim decided by a jury when it had knowledge of and had acquiesced in the jury demand filed by its co-third party defendant.

interpretation of Rule 16 (e).[4] Thus, Merex's argument does not meet the standard under Rule 10 of the Rules of this Court for granting certiorari.

Again, the Second Circuit fully considered and correctly decided the issue of the District Court's exercise of its discretion to declare the jury advisory as to Merex's promissory estoppel claim, and Merex has not raised any issue on this point for review by this Court. Accordingly, Merex's request for certiorari should be denied.

3. MEREX'S REMAINING CONTENTIONS ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT BECAUSE THEY CONCERN EVIDENTIARY QUESTIONS, FACTUAL FINDINGS AND/OR OTHER MATTERS OF DISTRICT COURT DISCRETION

Merex's petition makes a host of other arguments[5] that the Second Circuit carefully considered and summarily rejected as "meritless" (Appendix C at 53a). For the reasons summarized below, none of these arguments raises an issue appropriate for review by this Court because they each concern evidentiary questions, factual findings and/or other matters of District Court discretion.

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[4] To the contrary, the Second Circuit aptly noted that, while litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court (Appendix C at 52a, citing 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 39.11 (2d ed. 1993)).

[5] *See* petition at 26-30, together with Merex's corresponding "Questions Presented."

(a) The District Court Acted Properly In Dismissing Merex's Promissory Estoppel Claim After Trial

In dismissing Merex's promissory estoppel claim after trial, the District Court determined that Merex had not satisfied any of the four requirements for promissory estoppel set forth in *Philo Smith & Co. v. USLIFE Corp.*, 554 F.2d 34 (2d Cir. 1977) (Appendix A at 24a-36a). Merex's petition does not even dispute this analysis. Instead, it cites (at fn. 30) *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989) for the proposition that Merex was entitled to "benefit of the bargain damages" on its promissory estoppel claim. In addition to being irrelevant, Merex's argument is simply wrong. *Arcadian Phosphates* actually supports the Second Circuit's decision here in that it held that the proper measure of recovery in promissory estoppel cases is generally the plaintiff's out-of-pocket expenses.

(b) The District Court Acted Properly In Granting Fairchild's Motion During Trial To Dismiss Merex's Breach Of Contract And *Quantum Meruit* Claims

In granting Fairchild's Fed. R. Civ. P. 50 (a) motion during trial to dismiss Merex's breach of contract and *quantum meruit* claims, the District Court applied well-settled New York law to its findings of fact to conclude that: (i) Merex's contract claim was barred by the Statute of Frauds (Appendix A at 17a-23a, citing, *inter alia*, *Intercontinental Planning Ltd. v. Daystrom*, 24 N.Y.2d 372, 300 N.Y.S.2d 817 (1969) and *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48 (1953)) and (ii) the Statute of Frauds similarly barred an alternative claim for *quantum meruit* (Appendix A at 23a-24a, citing *Minichiello v. Royal Business Funds Corp.*, 18 N.Y.2d 521, 277 N.Y.S.2d 268 (1966), *cert. denied*, 389 U.S.

820 (1967)). The cases relied upon by Merex (petition at 27-28) do not raise any issue for review by this Court because they are all factually distinguishable and/or procedurally inapposite.[6]

(c) The District Court Did Not Abuse Its Discretion In Declining To Present Merex's Proposed Tortious Interference Claim To The Jury

The District Court's decision not to present Merex's proposed tortious interference claim to the jury was justified by the following reasons: (i) the claim was insufficient as a matter of law because it alleged that Fairchild had interfered with Merex's performance of its agreement *with Fairchild* (*see Marilyn Miglin, Inc. v. Gottex Industries, Inc.*, 790 F.Supp 1245 (S.D.N.Y. 1992), citing *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988)); (ii) the claim may have been time-barred; (iii) no evidence was introduced at trial to support such a claim; (iv) the claim was not contained in the

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[6] *See Sussex Leasing v. U.S. West Financial Services*, 877 F.2d 200 (2d Cir. 1989) (summary judgment dismissing claim for oral contract on Statute of Frauds grounds reversed because issue of fact existed as to whether plaintiff was a "finder" within the Statute or a principal outside the Statute); *Paper Corp. of the United States v. Schoeller Tech. Papers*, 807 F. Supp. 337 (S.D.N.Y. 1992) (defendant's post-verdict JNOV motion denied on ground that a reasonable jury could have concluded that various writings, including defendant's internal memoranda, were sufficient to satisfy Statute of Frauds); *Marcella v. ARP Films, Inc.*, 778 F.2d 112 (2d Cir. 1985) (involved a different section of the Statute of Frauds that, unlike N.Y. Gen. Oblig. Law §5-701 (10), did not expressly apply to implied-in-fact contracts); *Morris Cohon & Co. v. Russell*, 23 N.Y.2d 569, 297 N.Y.S.2d 947 (1969) (court found the existence of a signed writing between the parties and merely used *quantum meruit* to provide a missing term to the written agreement).

pleadings, nor did Merex ever make a pre-trial motion to amend its complaint to include such a claim; and (v) although Merex proposed a tortious interference claim in the pre-trial order, the order also contained Fairchild's objection to the claim.

Merex's reliance on *United States v. Hougham*, 364 U.S. 310 (1960), is unavailing. In that case, the Court held that the Government had not waived its right to change an election of statutory remedies set forth in its complaint because the Government had preserved its right to make such a change in the pre-trial order. The decision does not in any way support Merex's contention (petition at 26) that Merex's inclusion in the pre-trial order of a request to amend its complaint to assert a tortious interference claim compelled the District Court to present such a claim to the jury.[7]

(d) The Second Circuit Acted Properly In Rejecting Merex's Request For A New Trial

Merex's request for a new trial was based on its contention that the District Court committed procedural and evidentiary errors during trial (petition at 28-29). This contention is plainly insufficient to raise any question for review by an appellate court, especially since: (i) the alleged errors were "harmless errors" that did not adversely affect the

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[7] Merex's reliance on *Lamborn v. Dittmer*, 873 F.2d 522 (2d Cir. 1989) (petition at fn. 27) is also misplaced. That decision merely held that the District Court had the discretion to allow a plaintiff to rely at trial on a different method of establishing defendant's alleged breach of contract than the one set forth in the complaint or pre-trial order on the ground that defendant was not prejudiced thereby. The decision is inapplicable to the instant case, where Merex proceeded on a contract theory for seven years and then sought to assert an unrelated tort claim during trial.

substantial rights of Merex (*see* Fed. R. Civ. P. 61 and *Nat. R. Pass. Corp. v. 25,900 Square Ft. Parcel Of Land*, 766 F.2d 685 (2d Cir. 1985)) and (ii) alleged errors relating to rulings made before an advisory jury are not subject to review (*See, e.g., In re Incident Aboard D/B Ocean King*, 758 F.2d 1063 (5th Cir. 1985)). Thus, the Second Circuit acted properly in rejecting Merex's request.

(e) The District Court Acted Well Within Its Discretion In Denying Merex's Motions For Discovery Sanctions And Fed. R. Civ. P. 56 (g) Sanctions

It is well-settled that a District Court enjoys wide discretion in its handling of pre-trial discovery, and its rulings regarding discovery matters -- including sanctions -- are reversed only upon a clear showing of an abuse of discretion. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992). Similarly, Rule 56 (g) sanctions are discretionary, and are imposed only where the conduct complained of is particularly egregious. *See Fort Hill Builders, Inc. v. National Grange Mutual Insurance Co.*, 866 F.2d 11, 16 (1st Cir. 1989). Given these standards, there is no question that the District Court acted well within its discretion in denying Merex's motions for sanctions. Merex's petition (at 29-30) -- which does not even attempt to cite any contrary authority -- certainly does not raise any question on this point for review by the Supreme Court.

CONCLUSION

For these reasons, Fairchild respectfully requests that Merex's petition for a writ of certiorari be denied.

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December 13, 1994

Respectfully submitted,

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